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FERDINAND E. SCHWENGER

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IN THE
**Supreme Court
Of the United States**

OCTOBER TERM, 1977

No. 77-786

JEROME E. MOORE,

Petitioner,

v.

RICHMOND, FREDERICKSBURG AND POTOMAC
RAILROAD CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit were not reported. The decision of the United States District Judge is cor-

rectly set forth in the Appendix to the Petition. The per curiam opinion of the Fourth Circuit is included in the Appendix to the Petition. The per curiam opinion of the Fourth Circuit is included in the Appendix, but the pages in the opinion have been jumbled, presumably in the printing process, and accordingly, the opinion is reproduced as an Appendix to this Brief.

JURISDICTION

Jurisdiction of this Court is not conceded, it being the contention of Respondent that the Petition for Certiorari was not timely filed.

QUESTIONS PRESENTED

1. Was the Petition for Writ of Certiorari timely filed?
2. Does this case present a question which this Court should consider?
3. Are the decisions of the Courts below amply supported by the law and the evidence?

STATEMENT OF FACT ON TIMELINESS ISSUE

The judgment of the United States Court of Appeals for the Fourth Circuit was rendered on June 13, 1977. Petitioner filed nothing in this Court until November 14, 1977, one hundred and fifty-four (154) days thereafter. At that time, Petitioner filed in this Court a Motion to Extend Time For Docketing Appeal, to which was appended a proposed Petition For Writ of Certiorari. The Motion itself failed to set forth any jurisdictional grounds, nor did

it mention the judgment or judgments from which an appeal was being taken, nor did it include a copy of the decision or decisions sought to be reviewed. Neither the Motion nor the Petition was printed. Thereafter, on or about December 1, 1977, again without the permission of this Court or any Justice thereof, the Petitioner filed his printed Petition for Writ of Certiorari and an Appendix which reproduced the opinions of the Courts below.

STATEMENT OF PROCEEDINGS IN THE COURTS BELOW

Petitioner filed this action in the United States District Court for the Eastern District of Virginia, pursuant to Title VII of the Civil Rights Act of 1964. He alleged that his discharge from employment by the Respondent Richmond, Fredericksburg and Potomac Railroad Co., (RF&P) was on account of his race. RF&P answered, denying that race played any part in its decision to discharge Moore. This case was tried to the Court sitting without a jury on April 27, 1976. After hearing all the evidence, the Court found that race played no part in Moore's discharge and held that the suit should be dismissed. Moore appealed from that ruling, and on June 13, 1977 the United States Court of Appeals for the Fourth Circuit affirmed.

Petitioner Moore, along with three other men, Aubrey Marshall, Theodore Lomax and Brayton Clemons, was apprehended by the FBI in March of 1972 after a theft from the RF&P. Moore, Lomax and Clemons were charged with participation in the theft, but Marshall was not charged and was released that night. Two weeks later, a fifth employee, Floyd Brown, was arrested and charged with participation in the same incident. Moore and Lomax are black; Marshall, Clemons and Brown are white. The four employees

who were charged had all previously been under surveillance by the FBI because of informant information that they had been involved in earlier thefts. The criminal charges against Moore were eventually dropped; Lomax and Clemons were tried and convicted, and Brown was acquitted.

The RF&P itself charged all five of the men with violating company rules, and following hearings on those charges, Moore, Lomax, Clemons and Brown were discharged while Marshall was suspended for 29 days and thereafter discharged.

Moore based his charge of discrimination on the ground that he is black, whereas Marshall, a similarly situated white man, had only been suspended. The Superintendent of RF&P testified at trial that Marshall had been charged by the RF&P not only with the theft in question, but also with violations of other company rules related to a separate incident. He stated that the 29-day suspension allowed time to place all of the violations on Marshall's record and thus strengthen the case against him should he appeal his discharge to the National Railroad Adjustment Board. Additionally, he pointed out that Clemons, also a white man, had been discharged in connection with the theft charges.

ARGUMENT

I. The Petition for Writ of Certiorari Was Not Timely Filed, and Certiorari Should Not Be Granted.

Title 28, §2101(c) provides that a Writ of Certiorari must be applied for "within ninety (90) days after the entry of the judgment sought to be reviewed." It further provides that a Justice of this Court may, for good cause shown, extend that time for a period not exceeding sixty (60) days. It is provided under this Court's Rule 34(2) that

any application for an extension of time to file a Petition for Certiorari must be submitted at least ten (10) days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period. Petitioner in this case filed nothing in the first ninety days. Indeed he filed nothing at all until one hundred and fifty-four (154) days after June 13, 1977. It would appear, therefore, that not only did the Petitioner fail to secure additional time from a single Justice, as required by law, but no request for additional time was filed until the time had expired to which a single Justice could have extended the ninety-day period if he had been so inclined.

Additionally, it appears that the Motion, when finally filed, failed to meet the requirements of Rule 22(4) in that it did not set out the grounds on which the jurisdiction of this Court is invoked, did not identify the judgment sought to be reviewed, and was not accompanied by a copy of the Opinion of the Court below.

Finally, the Motion was further defective because it was not printed as required by Rule 35(2), inasmuch as it was not addressed to a single Justice and was, in addition, accompanied by a supporting Brief.

II. The Courts Below Did Not Disregard Any Decision of This Court.

Petitioner contends that the decisions of the lower courts are in conflict with the principle of *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). In deciding *McDonald*, the lower courts had held, without taking any evidence at all, that a Complaint was insufficient as a matter of law either under 42 U.S.C. 1981 or under

Title VII of the Civil Rights Act of 1964, in charging that the Defendants had unlawfully discriminated against the white plaintiffs by discharging them for certain criminal activity while retaining similarly situated black men. The Court, in reversing, held that Plaintiffs, if they could prove their contentions, were entitled to relief under either statute, and the case was remanded for the taking of testimony. In the case at bar, the District Court did not dismiss on the pleadings but took evidence and found as a fact that there had been no discriminatory conduct. There is no reason to suppose that the District Court or the Fourth Circuit ignored or improperly distinguished this Court's opinion in *McDonald*. On the contrary, the Fourth Circuit properly pointed out that the District Judge in this case did not dismiss on the pleadings but determined the issue after a trial.

III. The Decision in the Courts Below Is Amply Supported by the Evidence.

Petitioner Moore and the white employee with whom he seeks to identify, were not similarly situated. Criminal charges were brought against Moore but not against Marshall. Even more importantly, Moore and Marshall were given substantially the same treatment. Both of them were discharged, and the reasons for the delay in discharging Marshall were amply explained by the testimony. Neither was it lost on the Courts below that still another white man involved in this incident, Clemons, was promptly discharged. In short, there was ample evidence to sustain the decision of the District Judge.

CONCLUSION

Respondent respectfully urges that the Petition for Writ of Certiorari be denied for the reasons heretofore presented.

Respectfully submitted,

/s/ RICHMOND, FREDERICKSBURG AND
POTOMAC RAILROAD CO.

By:

Counsel

BOOTHE, PRICHARD & DUDLEY
711 Princess Street
Alexandria, Virginia 22313

By: */s/*

E. WALLER DUDLEY
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that two true copies of the foregoing Brief for Respondent in Opposition were mailed, postage prepaid, this 7th day of February, 1978, to John M. Wells, Esquire, 305 Franklin Street, Alexandria, Virginia 22314, and to Robert George Flick, Esquire, 1026 King Street, Alexandria, Virginia 22314, counsel for Petitioner.

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E. WALLER DUDLEY

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APPENDIX

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1952

JEROME E. MOORE,
Plaintiff-Appellant,

v.

RICHMOND, FREDERICKSBURG AND POTOMAC
RAILROAD CO.,
Defendant-Appellee.

Appeal from United States District Court for the Eastern
District of Virginia. Oren Lewis, District Judge.

Argued May 2, 1977 Decided June 13, 1977

Before WINTER and MOORE,* Circuit Judges, and
THOMSEN,** District Judge.

Robert B. Fitzpatrick (Geoffrey Judd Vitt, Cohen,
Vitt and Annand on brief) for Appellant;
Elizabeth L. Lewis (E. Waller Dudley, Boothe,
Prichard & Dudley on brief) for Appellee.

PER CURIAM:

Jerome E. Moore brought this action in the District
Court for the Eastern District of Virginia, Alexandria Di-
vision, pursuant to Title VII of the Civil Rights Act of
1964, 42 U.S.C. §2000(e) *et. seq.*, alleging that he was
discriminatorily discharged on account of his race by the
Richmond, Fredericksburg and Potomac Railroad Co.
("RF&P"). The district court determined after trial that
"[r]ace played no part in the plaintiff's discharge" and ac-

* Hon. Leonard P. Moore, United States Circuit Judge
for the Second Circuit, sitting by designation.

** Hon. Roszel C. Thomsen, United States District Judge
for the District of Maryland, sitting by designation.

cordingly denied all relief. We agree with this determination and affirm the dismissal of the action.

Moore, Aubrey Marshall, Theodore Lomax, and Brayton Clemons were apprehended by the FBI on the night of March 24, 1972 after a theft from their employer, RF&P. Moore, Lomax, Clemons were charged with participation in the theft, but Marshall was not charged and was released that night. On April 6, 1972, the FBI arrested a fifth employee, Floyd Brown, and charged him also with participation in the March 24 theft. Moore and Lomax are black; Marshall, Clemons, and Brown are white. The four employees who were charged had all previously been under surveillance by the FBI because of informant information that they had been involved in earlier thefts. The charges were subsequently dropped against Moore; Lomax and Clemons were convicted after trial; Brown was acquitted.

RF&P charged all five employees with violating company rules and held hearings on the charges against each employee. At the close of the hearings, Moore, Lomax, Clemons, and Brown were discharged. Marshall was suspended for 29 days and then discharged.

On August 18, 1975, Moore brought this action against his former employer, alleging that he had been discriminatorily discharged on account of his race. He sought reinstatement and back pay. The gravamen of his complaint was that he had been discharged for the theft whereas Marshall, a similarly situated white man, had merely been suspended.

At the trial, an RF&P Superintendent testified as to the rationale behind the handling of Marshall's case. Marshall had been charged not only with the March 24 theft, but also with other violations of company rules in connection with a subsequent incident. The 29-day suspension allowed time to place all of the violations on Marshall's record and thus strengthen the case against him in case he appealed his discharge to the National Railroad Adjustment Board.

Moore argues on appeal that the unequal treatment of Marshall and himself is indistinguishable from the unequal treatment which the Supreme Court found violative of Title

VII in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). In *McDonald*, however, the district court had dismissed the complaint on the pleadings. Thus, in reviewing the dismissal, the Supreme Court took all of the plaintiff's allegation to be true. It summarized the allegations as follows:

"Fairly read, the complaint asserted that petitioners were discharged for their alleged participation in a misappropriation of cargo entrusted to Santa Fe, but that a fellow employee, likewise implicated, was not so disciplined, and that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are white." 427 U.S. at 282-83.

If those allegations were true, the Supreme Court held, then Title VII had been violated. Thus, the Court determined that the district court had erred in dismissing the complaint for failure to state a claim, and remanded the case for further proceedings.

The Judge did not dismiss the present case on the pleadings; rather, he determined after a trial that Moore's discharge was not racially motivated. There was ample evidence to support this determination. Employees Moore and Marshall were not similarly situated. Criminal charges had been brought against the one, but not the other. The FBI had informant information as to Moore, but not as to Marshall. More importantly, Moore and Marshall were not given significantly unequal treatment. They were both discharged, the only difference being that Marshall's discharge was preceded by a 29-day suspension. The reason for this minor difference in treatment was amply explained by the RF&P Superintendent who testified at the trial. The district court's determination that this explanation was valid and was not a cover-up for a racially-motivated decision is reinforced by the fact that Moore and Brown, another white employee, received identical treatment.

We conclude that Moore's discharge was not racially motivated, and thus affirm that dismissal of his Title VII action.